MOTION FILED
OCT 23 1985

No. 84-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MICHAEL BENDER, *et al.*,
Petitioners,
v.
THE WILLIAMSPORT AREA SCHOOL DISTRICT, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE POST-ARGUMENT BRIEF AND POST-ARGUMENT BRIEF OF PETITIONERS

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MOTION OF PETITIONERS TO FILE POST-ARGUMENT BRIEF

Pursuant to Rule 35.6 of the Rules of this Court, Petitioners Bender, et al, move for leave to file a post-argument brief.

Upon oral argument, it became evident that the briefs of the parties (including movants) had not adequately addressed the threshold issue of Respondent's standing to appeal from the judgment of the district court. To assist the Court in its decision, Petitioners believe that a short post-argument brief will prove helpful.

Wherefore, movants respectfully request that their motion for leave to file the following post-argument brief be granted.

Respectfully submitted,

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POST-ARGUMENT BRIEF OF PETITIONERS

ARGUMENT

This supplemental brief addresses two issues of justiciability—mootness and standing. These matters were noted in the Petition for Certiorari, Cert. Pet. at 8-9, n.7, and also in Petitioners' Brief, Pet. Br. at 8, n.7. They were not treated at length therein as the parties are not opposed on these points. In view of some questions raised by the Court during oral argument, Petitioners submit this brief to further clarify their position.

I. Mootness

A. The question of mootness must be distinguished from the question of standing. The crux of the jurisdictional issue now being raised is whether Respondent

Youngman had *standing to appeal* from the decision of the district court. The court below concluded that Mr. Youngman had standing to appeal. If he did not, the court of appeals would then have lacked jurisdiction to hear his appeal and its decision would have been invalid.[1] If that were the case, this Court should vacate the opinion of the court of appeals and reinstate the decision of the district court.

United States v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950) is inapposite. The rule of *Munsingwear* requires that all lower court opinions be vacated if a case has become moot. There is no rule suggesting that a case is moot simply because a lower court opinion is vacated for some other reason (e.g., the rendering court lacked jurisdiction).

The question of Respondent Youngman's standing to appeal is distinct from the question of mootness. If Mr. Youngman's standing to appeal were thought to be based on his school board membership (a premise we think inaccurate), the loss of such membership might create the impression that the case itself had become moot. In fact, however, Mr. Youngman would only have lost whatever *standing* to appeal he might have possessed solely by virtue of being a member of the school board. Under such a view, Mr. Youngman would no longer be able to maintain the appeal in that capacity, and the court of appeals would have lacked proper parties to retain jurisdiction of the appeal. The case would not thereby be *moot*; it simply would be *over*, the students having prevailed in the district court and no proper party appealing that judgment. The relief ordered by the district court against the school board would stand, just as any unappealed district court judgment stands.

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[1] If the court of appeals had jurisdiction, this Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

For reasons explained below, however, we believe Mr. Youngman's *standing to appeal* is not based on his school board membership but on his status as a parent of children attending Williamsport High School. *Infra* at 4-5.

B. A controversy of constitutional dimensions continues between the Board and the students, affecting "the legal relations of parties having adverse legal interests." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937). Nothing has changed in the relationship between the school board and the students to render this case moot. The Board continues to rely on the judgment of the court of appeals as its basis for banning the student meetings and for opposing an award of attorney fees. Cert. Pet. App. D 109a-112a; J.A. 146-148.[2] The Board's limited interest in complying with the law[3] thus places it at odds with the legal interests asserted by the students. A final judgment in this litigation is needed to determine the respective legal rights of these parties. At present, the Board will not allow Petros to meet. Should this Court reverse (or even vacate) the judgment of the court below, the Board would allow Petros to meet.

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[2] We do not suggest that the Board has acted in bad faith. On the contrary, the Board may be correct in its assertion that it is bound in some sense by the judgment of the Third Circuit notwithstanding the fact that it was not the appealing party. *Cf. Smuck* v. *Hobson*, 408 F.2d 175, 180-181 (D.C. Cir. 1969) (*en banc*).

[3] The Board's interest is similar to that of an interpleader or stakeholder filing a "Bill of Peace." *Cf. Commack School Dist.* v. *Rossi, et al.*, No. CIV-85-1288 (E.D.N.Y. 1985) (school district, faced with competing claims, suing for declaratory judgment). Here, the Williamsport School Board has asserted no stake in the "fund" as such (it purports to be indifferent to whether Petros meets) but only in complying with the law and thereby avoiding multiple liability. While the Board's interest in the "fund" may be satisfied whatever the court decides, the case itself is not moot until the claims of competing claimants to the "fund" are finally resolved.

II. Standing

Petitioners did not challenge the standing of Mr. Youngman in the Third Circuit. We believe that Mr. Youngman was an appropriate party to maintain the appeal, not by virtue of his board membership[4] but by virtue of his status as an objecting parent who at all relevant times had children attending Williamsport High School. Clearly, if the school board attorney had decided in the first instance that Petros could meet, Mr. Youngman would have had standing to complain of such a policy. *See, e.g., Wallace* v. *Jaffree*, slip op. No. 83-812 at 3-4 (June 4, 1985); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 224 n.9 (1963); *McCollum* v. *Board of Education*, 333 U.S. 203, 205 (1948). The situation on appeal to the Third Circuit was not meaningfully different. Mr. Youngman's position was that the Board, by failing to appeal, was inadequately representing his interests as a parent opposed to the Petros meetings. *See* Brief for Respondent at 6, n.3. *Cf. National Wildlife Federation* v. *Gorsuch*, 744 F.2d 963, 969-970 (3rd Cir. 1984); *Smuck*, 408 F.2d at 181.

Mr. Youngman would have had a right to intervene in the litigation to defend this interest. *Smuck*, 408 F.2d at 178-182; *see United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395, n.16 (1977) (citing *Smuck* with approval); *Legal Aid Society at Alameda County* v. *Brennan*, 608 F.2d 1319, 1328 (9th Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). While it otherwise might have been preferable for a parent to file a formal motion under Fed. R. Civ. P. 24 to intervene as a party defendant for purposes of prosecuting an appeal, such a motion would have been a redundancy for Mr. Youngman, who was

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[4] We question whether Mr. Youngman ever had standing to appeal in his capacity as a school board member. The Board as a body voted against taking an appeal. *See Smuck*, 408 F.2d at 177-178; *cf. Snyder* v. *Buck*, 340 U.S. 15 (1950). Mr. Youngman's proposed substitution of a successor board member likewise seems irrelevant.

already joined as a party defendant and sued individually. Indeed, it would seem technically impossible to intervene if one is already a party.

Moreover, had Mr. Youngman not appealed, he likely would have been collaterally estopped from challenging, as a parent, the acquiescence of the school board in the judgment of the district court. *See Gorsuch*, 744 F.2d 963; *Brennan*, 608 F.2d at 1328, n.9; *cf. Smuck*, 408 F.2d at 182. The preclusive effects of such a judgment would seem especially strong in actions like this one, which states a claim for, *inter alia*, declaratory relief.

At all events, Petitioners believed Mr. Youngman had standing to appeal and that the judgment of the district court was to be defended on the merits. Should this Court conclude otherwise and hold that Mr. Youngman lacked standing to appeal, the proper result is to then reinstate the judgment of the district court allowing Petros to meet.

Respectfully submitted,

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